

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AT CHARLESTON

JEFFREY E. SKIDMORE,

Appellant,
Petitioner below.

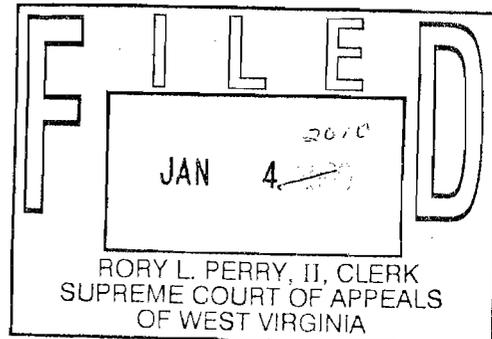
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vs.

Case Action No. 35291
(Appeal from a **July 6, 2009** Order of
the Circuit Court of
Braxton County, 99-D-133)

CRYSTAL L. SKIDMORE,

Appellee,
Respondent below.



BRIEF OF THE APPELLEE

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December 31, 2009

“God could not be everywhere, and
therefore, He made Mothers.”

— Lew Wallace, *Ben Hur*

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BRIEF OF THE APPELLEE

Comes now the Appellee, **CRYSTAL L. SKIDMORE** (now **ROGERS**), Respondent below (hereinafter 'Appellee'), by her attorney, James Wilson Douglas, pursuant to Rules 3(c) and 10(d) of the Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and in and for her Brief in Opposition to Appellant's Petition for Appeal, does aver, depose and say, as follows:

STANDARDS OF REVIEW

Appellee maintains that the appropriate standards of review for the issues presented hereinafter is *abuse of discretion* and *de novo*.

NATURE OF THE PROCEEDING AND RULINGS BELOW

After a seven (7) year marriage, the Appellant filed for a divorce from the Appellee just before Christmas 1999. Following a zealously prosecuted and defended action below (Braxton County, 99-D-133), and two (2) failed mediations, the Parties were divorced by a Bifurcated Final Order entered on February 26, 2002.

Although equitable distribution issues were resolved by the bifurcated decree, a separate hearing and order was required on parenting and child support matters concerning the Parties' male child, born June 22, 1997, which document was also entered on February 26, 2002 as a Final Parenting Order on Remand. At the end of this phase of the case, Appellee was designated the residential (custodial) parent of the Parties' son.

Pertaining to the matter *sub judice*, the first focus of this appeal revolves about Appellant Father's March 7, 2008 Petition to Modify the Parenting Plan, which invoked the "substantial change of circumstances" provisions of West Virginia Code §48-9-401, and, secondarily, West Virginia Code §48-9-209¹, to change the affected son's residential custody from the Appellee Mother to the Appellant Father. This issue was resolved against the Appellant as a matter of fact

¹This Code section enumerates certain fact driven incidents of parental conduct as "limiting factors" in arriving at a parenting plan.

and as a question of law by both the Family and Circuit Courts of Braxton County, as shown by February 9, 2009 Final Order and June 23, 2009 Order Affirming Family Law Judge, respectively.

The second aspect of this appeal was the product of the January 16, 2009 Expedited Child Support Petition filed by the Appellee², acting *pro se*. Family Court Judge Sowa held an evidentiary hearing on March 18, 2009, wherein Appellant's child support obligation was increased. Although there was an absence of antecedent pleading, Appellant *orally asked* that he be permitted to be the primary carrier of the son's health insurance, which was precisely contrary to the parenting plan and the prior order of the Court that the Appellee Mother should provide the primary health insurance coverage for the subject male child. The Final Order of the Family Court Judge reflecting the March 18, 2009 findings was entered on March 30, 2009.

²Inexplicably, Family Court Judge Robert Reed Sowa determined at the January 15, 2009 pronouncement of his ruling on modification that, despite the Appellee's March 31, 2008 Reply to the Appellant's Petition asking in her prayer for a recalculation of child support, her pleadings were deficient in that regard; and he, the Family Court Judge, would not award an increase of child support to the Appellee, although he believed that she was otherwise entitled to such increase. The Family Court Judge went on to specify how much such increase would be. See the denial contained in the Family Court's February 9, 2009 Final Order, heretofore designated by the Appellee.

Perhaps an explanation can be found in the March 18, 2009 DVD record before Family Court Judge Sowa on the issue of expedited child support modification where he *thrice* mentioned or stated to Appellant's counsel that he (the Family Court Judge) had saved the Appellant "three grand [at the January 15, 2009 pronouncement of his decision on the modification issue]". See 11:21:06 and 40 and 11:22:40 of the March 18, 2009 Family Court DVD record heretofore designated by the Appellee.

Appellant filed an appeal of the Family Court Judge's March 30, 2009 decision, which was refused by the July 6, 2009 Order of the Circuit Court of Braxton County.

From these two (2) affirming Orders of the Circuit Court of Braxton County, the Appellant prosecutes this appeal.

As an aside, it is significant to note that, contrary to his certificate of service, Appellant's counsel of record **DID NOT** serve a copy of his August 23, 2009 Petition for Appeal to this Court upon Appellee or her undersigned attorney, as required by Rule 4A, WVRAP, thereby depriving the Appellee of an opportunity to respond to the Appellant's Petition for Appeal, as contemplated by said Rule. In point of fact, the Appellant's certificate of service for said Petition for Appeal reflects a service date of *July 23, 2008!*

STATEMENT OF THE FACTS OF THE CASE

The Parties were married in Braxton County on August 15, 1992, and they separated on December 18, 1999. Appellant Father, a career West Virginia State Police officer, filed for divorce on December 20, 1999. There was one (1) child of the marriage, namely Joshua Earl Skidmore, born June 22, 1997. A protracted, extremely adversarial and unnecessary custody contest resulted in the Appellee Mother being awarded primary residential custody of the infant son, as confirmed by the February 26, 2002 Final Parenting Order on Remand, which

decree was generated by the policeman Father's first appeal to the Circuit Court of Braxton County.

Subsequent to the entry of the Parties' February 26, 2002 Bifurcated Divorce Decree, the Appellant Father immediately remarried, and he sired a second child, Jordan Elyvia Skidmore, a female, who was born on March 28, 2003. Following the birth of the younger female, and grounded primarily on the fact of the arrival of such later child, the Appellant sought a reduction of his child support obligation, which was denied on the basis of West Virginia Code §48-1-202 (b), as shown by the September 16, 2005 entry of an Order Denying (Appellant's) Petition to Modify.

The ensuing history of litigation in this cause, which, to date, has endured for nearly ten (10) years, or three (3) years longer than the Parties were actually married and living together (and 8 ½ years of the son's 11 year life), reveals that, all told, the Appellant Father has filed eleven (11) post-divorce petitions³. Twenty-three (23) orders⁴ have been entered to date in this action. See the Braxton County Civil Docket Sheet for Case Number 99-D-133, designated by the Appellee.

³2 Petitions for Contempt, 2 Petitions for Writs of Prohibition, 3 Petitions for Modification, 3 Circuit Court Appeals and the 1 instant Appeal.

⁴5 Temporary and Interim Orders, 5 "Final" Orders, and 13 Miscellaneous Orders, which include various decisional Appeal Orders.

Consistent with his penchant for litigation and in his seemingly endless quest to minimize his child support obligation, as revealed by the civil docket sheet of the Braxton County Circuit Clerk in this case, the Appellant filed his most recent Petition to Modify the Parenting Plan on March 7, 2008, citing a substantial change of circumstances not in contemplation of the Parties at the time of the entry of the original ordered parenting plan, and limiting factors, as grounds therefor. In his prayer, the Appellant sought *a reversal of residential parent status* in his favor regarding the Parties' now eleven (11) year old son, and a recalculation of his previously ordered child support. Worthy of note is that the Appellant *never alleged* in his original pleadings or any amendments thereto, that the Parties' 2002 parenting plan in some "*specific way*" was "*manifestly harmful*" to the subject child, thereby constituting the statutory "*exceptional circumstances*"⁵ warranting a modification, notwithstanding the absence of the otherwise required substantial change of circumstances.

The Appellee filed her responsive pleading in opposition on March 31, 2008, and prior to the Appellant's amendment of his Petition on August 11, 2008, Appellant advanced a Rule 17⁶ Motion for Leave to Take Child Testimony of the Parties' eleven year old son on July 7, 2008. The Appellee Mother lodged

⁵West Virginia Code §48-9-401 (b)

⁶Rule 17, WVRCP, which governs the procedure for the taking of a child's testimony who is under the age of 14 years.

her objection in a vain effort to avoid directly involving the Parties' son through her written pleading of July 10, 2008. Family Court Judge Robert Reed Sowa took the Appellant's Rule 17 Motion under advisement, but, *sua sponte*, appointed a Guardian *ad Litem*, over the Appellee's objection, by an August 25, 2008 Order that neglected to specify the terms of the appointment, i.e., the Guardian *ad Litem*'s role, his duties, or the general scope of his authority, all of which is required by statute⁷. The Guardian *ad Litem* issued a written report on November 14, 2008, and he was examined (telephonically) by the Parties and the Court on December 31, 2008.

A final hearing on the modification issue was held on September 30, 2008, without the benefit of the Guardian *ad Litem*'s report, which was not filed until November 14, 2008. Subsequent to a December 31, 2008 telephonic examination of the Guardian *ad Litem* by the Parties and the Court, the Family Court Judge announced his ruling January 15, 2009. Basically, the Family Court Judge denied Appellant's Petition to change custody due to Appellant's failure to meet his burden of proof to demonstrate a substantial change of circumstances not in contemplation of the Parties at the time of the entry of the original ordered parenting plan. Appellant did not present any evidence of limiting factors at trial.

The Appellant pursued an appeal of the Family Court Judge's ruling

⁷West Virginia Code §48-9-302(a).

before the Honorable Jack Alsop, Judge of the Circuit Court of Braxton County, who, after hearing oral argument on March 6, 2009 and reviewing the record of the case, affirmed the Family Court Judge by the former's Order of June 23, 2009, from which the Appellant has taken further appeal to this august body.

With respect to the health insurance issue, ancillary to a collateral January 16, 2009 Expedited Child Support Petition filed by the Appellee, *pro se*, Family Court Judge Sowa held an evidentiary hearing on March 18, 2009 resulting in *an increase* in Appellant's child support obligation, and *a continuation* of an earlier determination that the Appellee Mother should provide the primary health insurance coverage for the subject male child. The Final Order of the Family Court Judge reflecting the March 18, 2009 findings was entered on March 30, 2009.

Once again, the Appellant filed an appeal of the Family Court Judge's decision before Judge Alsop, who refused Appellant's April 20, 2009 (second) appeal following an April 27, 2009 presentation, and after a thorough review of the record of the case. Consequently, the Circuit Judge affirmed the Family Court Judge by his July 6, 2009 Order, hence this appeal.

**ALLEGED OMISSIONS OR INACCURACIES OF THE
APPELLANT'S STATEMENT OF THE FACTS OF THE CASE**

The Appellant's Petition for Appeal and Appellant's Brief fail, neglect, or omit to state, or inaccurately states, the following uncontroverted,

unrefuted and uncontradicted facts of this case; to-wit:

1. Modification of Custody Issue:

- a. That, as noted hereinabove, Appellant *never alleged* in his original pleadings or any amendments thereto, that the Parties' 2002 parenting plan in some "*specific way*" was "*manifestly harmful*" to the subject child, thereby constituting the statutory "*exceptional circumstances*"⁸;
- b. That no evidence, in the form of either expert or lay testimony, was elicited from any quarter at any time that the 2002 parenting plan was "*manifestly harmful*" to the subject male child in some "*specific way*";
- c. That no expert evidence was presented by the Appellant at the September 30, 2008 hearing that the subject 11 year old male child and his 5 year old female sibling of the half blood had a strong psychological bond;
- d. That the female sibling of the half blood was not often present during the male son's visitation with Appellant;
- e. That the Appellant had filed a Rule 17 (WVRPPFC) Motion for

⁸West Virginia Code §48-9-401 (b)

Leave to Take the Testimony of the 11 year old child at the modification hearing, which was opposed by the Appellee, but taken under advisement by the Family Court Judge;

- f. That in his “investigation”, the Guardian *ad Litem* only interviewed three witness— the Appellant Father, the Appellee Mother and their eleven year old son;
- g. That in his November 14, 2008 Report, the Guardian *ad Litem* did not recommend “equal time”, as represented by the Appellant;
- h. That Guardian *ad Litem* at his December 31, 2008 telephonic examination would not and did not state that the current parenting plan was “manifestly harmful”;
- i. That the Family Court Judge did not rule that “manifestly harmful” for §401 purposes “. . . must rise to the level of abuse or neglect to warrant modification.”, as mis-quoted by the Appellant in his Petition, but the Family Court Judge concluded as a matter of law, that manifestly harmful must be “close to” abuse and neglect if a petitioner relies on that ground for a modification of a parenting plan. See Paragraph 9., i., vii.

of the Family Court Judge's February 9, 2009 Final Order; and,

- j. That the Appellant's *entire case*, from an evidentiary standpoint, rested upon the desires of the Parties' then eleven (11) year old son, expressed through the Guardian *ad Litem*, and the Appellant's stated goal of "equal parenting time".

2. Assignment of Health Insurance Issue:

- a. That the Appellant's February 6, 2009 Response to the Appellee's January 16, 2009 *pro se* Petition for Expedited Modification of Child Support, did not include any request or even mention assignment of primary responsibility of the health care coverage for the Parties' infant son;
- b. That at the March 18, 2009 hearing on Appellee's January 16, 2009 *pro se* Petition for Expedited Modification of Child Support, the Appellant presented neither evidence nor demonstrative exhibits comparing/contrasting the quality or the costs of the Parties' respective employment related health insurance coverages. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:31:39 and 11:33:10-13;

- c. That at the time of the March 18, 2009 hearing on Appellee's January 16, 2009 *pro se* Petition for Expedited Modification of Child Support, the Appellant did not have dental coverage for the subject infant, or his female sibling of the half blood. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:35: 53-57 and 11:39:40-43;
- d. That if the Appellant were to procure dental coverage for the family plan, he would have to pay more for that ancillary benefit. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:40:23-25;
- e. That at the time of the March 18, 2009 hearing on Appellee's January 16, 2009 *pro se* Petition for Expedited Modification of Child Support, the Appellee *did have dental coverage* for the subject infant, and the Appellee had no co-pay requirements under the Federal Government's Plan. See Appellee's pay stubs and Medical-Dental Plan Exhibits "A" and "B", respectively, attached hereto. Also, see the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:34:59-11:35:02;

- f. That the Appellant Father, without antecedent pleadings which would have put the mother on notice, was, in reality, *attempting to modify orally* the February 26, 2002 Final Parenting Order on Remand, that had assigned the infant son's primary health care coverage to the Appellee at her request, and with the acquiescence of the Appellant at that time;
- g. That on March 18, 2009, the Family Court Judge made none of the conclusionary findings attributed to him by the Appellant regarding the comparative quality or costs of the Parties' respective health insurance plans, primarily because the Appellant failed or neglected to put on a case for this unpled and unnoticed issue. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:34:01-11:40:25;
- h. That in the absence of any modification pleadings on the issue and the presentation of any empirical data by the Appellant, the Family Court Judge did find that the historical animosity attendant upon the instant case, the multiple court appearances of the Parties, various prior contempt actions, the necessity for

the Parties to directly communicate more often, and the continued primary caretaker and residential parent status of the Appellee Mother, who would be the parent taking the child to health care providers in the first instance, militated in favor of a ***continuation*** of the primary health care/insurance responsibility with the Appellee Mother. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:37:00-11:38:03; and,

- i. That at the March 18, 2009 hearing, the Family Court Judge, after running certain child support calculations, did also find that the Appellant's child support ***would increase even if*** he had been awarded the responsibility for the son's health care coverage. See the March 18, 2009 Family Court DVD on case 99-D-133 (Braxton County), Tracts 11:34:05 and 11:40:24.

ISSUES PRESENTED AND ADDRESSED

1. Is a Family Court Judge bound by the recommendations of a Court-appointed Guardian *ad Litem* on the ultimate issue of modification?
2. Must all elements of a statutorily prescribed cause of action be alleged and proven in order to entitle a petitioner to his requested relief?

3. May a Family Court Judge employ his discretion to provide a child with the best insurance coverage available through his parents' respective employers, irrespective of the impact upon a child support calculation?

AUTHORITY AND ARGUMENT

I. The Modification Issue-The Guardian *ad Litem*'s Recommendation

Absent an apparent abuse, the discretion of a Family Court Judge in appointing a Guardian ad Litem and the same discretion in accepting or rejecting his recommendations should not be disturbed on appeal.

In the case *sub judice*, the Guardian *ad Litem* was appointed on August 25, 2008 upon the Family Court Judge's own motion and over the objection of the Appellee. Worse, the appointment of the Guardian *ad Litem* was made without any written directions, definition of role, or a clear statement of his duties or the limits of his authority, as mandated by statute. West Virginia Code §48-9-302(a). As it turned out, the Guardian *ad Litem* became a custody evaluator; and, as made manifest by the Guardian *ad Litem*'s belated November 14, 2008 Report and his December 31, 2008 telephonic testimony, the Guardian *ad Litem* served merely as a conduit for the out-of-court and second handed expression of the child's purported desires *on the ultimate issue* of the case.

Essentially, the *sua sponte* appointment of the Guardian *ad Litem* in the case below, permitted the Family Court Judge to evade the pre-requisites of

Rule 17, WVRPPFC, and to make a *de facto* ruling permitting the child to testify through the Guardian *ad Litem*. Obviously, this denied the Appellee the evidentiary right of cross-examination.

Apart from these irregularities, was the Family Court Judge bound by the recommendation of the Guardian *ad Litem*? Of course not. To do otherwise would empower eleven year old or younger children to determine the outcome of any litigation involving their parenting, notwithstanding what would promote the best interests of the child. Since the year 2000, it has been established that parents have a Constitutionally protected substantive due process right to their children, which cannot be defeated by third parties if the parents are otherwise fit. *Troxel v. Granville*, 530 U.S. 57 (2000). This rule should also apply to the minor children themselves who try to invade that right by the expression of an ill-formed, immature or improperly motivated custodial preference.

Moreover, the right of a child in West Virginia to nominate his or her guardian or custodian when he or she has attained the age of fourteen (14) years is not without limitation and far from absolute, in that, the nomination must be shown to be promotive of the child's general welfare and best interests. *Alireza D. v. Kim Elaine W.*, 198 W.Va. 178, 479 S.E.2d 688 (1996); *Cloud v. Cloud*, 161 W.Va. 45, 239 S.E.2d 669 (1977). See also West Virginia Code §44-10-4 and

§48-9-402(b)(3).

But it is more than the issue of whether an expressed custodial or visitation preference of a child is mature or reasoned, and thus should be honored; or, whether the attainment by the child of some magical age is dispositive of parenting time disputes. No court, whether exercising general or limited jurisdiction, can abdicate its office, and delegate its decision making power to a third body or entity. *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

A more thorough discussion is warranted here. In the exercise of its fact finding function with regard to parenting issues, West Virginia Code §48-9-302(a) merely offers a family court judge the services of a guardian *ad Litem* “... to represent the child’s best interests.” The office of guardian *ad Litem* was never intended by the Legislature to be a *de facto* custody evaluator, or a contrivance through which the testimony of a child, otherwise not admissible or subject to cross-examination, could be entered into the evidence of the case. *Id.* Moreover, the recommendation of a guardian *ad Litem* should not represent an unconstitutional assignment of judicial authority to decide the ultimate issue of a case in which he or she is appointed. *Id.*

Specifically, by statute, the appointment of a guardian *ad Litem* is within the discretion of the Family Court Judge; therefore, the Family Court

Judge's acceptance, rejection, compliance or moulding of a guardian *ad Litem*'s recommendations in the case below, was and is likewise within the former's absolute discretion. The naked fact of the Guardian *ad Litem*'s appointment by the Family Court Judge below is not, *a fortiori*, a forfeiture of the Family Court Judge's authority or office. In short, the recommendation of the Guardian *ad Litem* herein is merely advisory and the final decision of the Family Court Judge in this cause was not bound by the same.

II. The Modification Issue-The Appellant's Absence of Pleading and Proof

The proponent in an action for modification of a parenting plan must by pleadings and by proof show not only a change of circumstance but also that the best interests of the child will be promoted by the modification.

Family Courts in West Virginia are tribunals of limited jurisdiction the authority of which is set, defined and controlled by statutory promulgation.

See West Virginia Code §51-2A-1 *et seq.* As a consequence, family courts and family court jurisdiction, in being creatures of statute, must be strictly construed.

Lindsie D.L. v. Richard W. S., 214 W.Va. 750, 591 S.E.2d 308 (2003).

Primarily, the question before the Court is one of statutory construction:

When examining an issue requiring statutory construction, we first determine the expression of legislative intent evident in the subject statute. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). "Once the legislative intent underlying a particular

statute has been ascertained, we proceed to consider the precise language thereof." State ex rel. McGraw v. Combs Servs., 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (1999). If the language employed by the Legislature in the given enactment is plain, we apply, rather than construe, such provision. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect" Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951). Accord DeVane v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed." (citations omitted)). In re the Adoption of Jon, 218 W.Va. 489, 293, 625 S.E.2d 251, 256 (2005).

In the case at bar, neither Appellant's original March 7, 2009 Petition to Modify Parenting Plan nor his August 11, 2008 amended Petition⁹ to Modify Parenting Plan contained allegations or averments that the then current (2002) parenting schedule in some "*specific way*" was "*manifestly harmful*" to the subject child, as specifically set forth in West Virginia Code §48-9-401(b)¹⁰, which is structured in conjunction (*'and'*) with the court finding that the parenting plan was not working, and which is further limited to "*exceptional circumstances*" in its intended infrequent application. *Id.* The above cited statute could not be more clear in its requirements; therefore, application rather than

⁹Appellant was permitted to file a second Petition for having failed to sign the original Petition, as required by Rule 11, WVRCP, applicable to domestic relations actions under Rule 81 (a)(2).

¹⁰The cited sub-section provides:

"(b) In exceptional circumstances, a court may modify a parenting plan if it finds that the plan is not working as contemplated and in some specific way is manifestly harmful to the child, even if a substantial change of circumstances has not occurred."

construction of its terms is mandated by law. *Jon, supra*.

In both instances of pleading, the Appellant preferred to rely instead upon the traditional change of circumstances ground, not in contemplation at the time of the entry of the original decree. Of special significance is the uncontroverted fact that the stated objective of the Appellant's March 7, 2008 Petition was to *change custody* of the eleven year old son from the Appellee Mother to the Appellant.

Examining the Appellant's pleading more closely revealed: (a) averments in the nature of contempt, (b) references to the birth of the Appellant's second child, who was five (5) years old at the time of pleading closure, and her "close relationship" with the Parties' son, and (c) heavy reliance upon the desires of the infant son, as related by the Appellant.

At the September 30, 2008 trial, the Family Court Judge sustained the Appellee's position that the contempt allegations were irrelevant, as pled, to the modification issue. In addition, the Appellee did stipulate that the subject child and his five-year old¹¹ half sister had a "bond", but the Appellee never agreed that there was a "psychological bond" between the son and the female sibling. At any rate, Appellant called no expert to testify about any psychological bound running

¹¹This Court has held that psychological bonds regarding children can only be successfully argued where the subject child is something more than an infant. See *In re Alyssa*, 217 W.Va. 707, 619 S.E.2d 220 (2005).

between the two children. Presumably this “sibling based” ground, even if otherwise actionable, was not proven for the simple reason that the half sister was not always present during the Appellant’s parenting time with the son. See the corroborating conclusion by Family Court Judge Sowa, in his February 6, 2009 Final Order on the Modification, Paragraph 9., i., viii.

The Appellant then proceeded to advance his cause solely upon the twin grounds of the eleven year old son’s desires and his, the Appellant’s objective of obtaining “equal” parenting time. “Limiting factors”¹² evidence was not submitted by the Appellant, though he had pled the same in his Petition to Modify. Expert testimony on any issue was not presented by the Appellant. The Appellant offered no substantial change of circumstances evidence, other than the subject child was older, that he desired more time with the Appellant, and the alleged “close relationship” with a much younger half sister, whom he only occasionally interacted. After the November 14, 2008 submission of the Guardian *ad Litem*’s Report, the Appellant cited said report as an additional reason for, but not as evidence supporting, an “*equalization*” of parenting time. See page 2 of the

¹²West Virginia Code §48-9-209, which is customarily utilized in initial custody determinations. Also, it is interesting to note that the Appellant conceded to the Guardian *ad Litem* that there were no “limiting factors”, and that the Appellee was “a good parent”. See page 2 of the Guardian *ad Litem*’s November 14, 2008 Report. In addition, the Appellant contradicted his March 7, 2008 Petition to Modify when he related to the Guardian *ad Litem* that the son was “no behavior problem at school.” Cf. Paragraph 7., n. of Appellant’s March 7, 2008 Petition to Modify and page 3 of the Guardian *ad Litem*’s November 14, 2008 Report.

Guardian *ad Litem*'s November 14, 2008 Report.

Placing these facts within a legal framework, a well settled rule, with Constitutional underpinnings grounded in the procedural due process requirements of notice, prescribes that a pleading must set forth in clear language, a short, direct and plain statement of the claim showing the pleader is entitled to the relief he seeks. Rule 8 (a) and (e), WVRCP. In addition, it has been long established that one petitioning for modification must prove his case by a preponderance of the evidence. *Misty D.G. v. Rodney L.F.*, 650 S.E.2d 243 (WV 2007), citing *Sharon B.W. v. George B.W.*, 203 W.Va. 300, 507 S.E.2d 401 (1998). Cf. the burden assignments of West Virginia Code §48-5-403(b) and *Anderson v. Anderson*, 78 W.Va. 118, 88 S.E. 653 (1916).

Applying these time honored principles to the case at bar, the Appellant had to allege and prove, by a preponderance of the evidence, that the Parties' 2002 parenting schedule qualified as "*exceptional circumstances*" AND that the said parenting plan was not working AND in some "*specific way*" was "*manifestly harmful*" to the subject child, as specifically prescribed by West Virginia Code §48-9-401(b)¹³. The Appellant failed to accomplish evidentiary

¹³The cited sub-section provides, in supplied emphasis:

"(b) *In exceptional circumstances, a court may modify a parenting plan if it finds that the plan is not working as contemplated and in some specific way is manifestly harmful to the child, even if a substantial change of circumstances has not occurred.*"

satisfaction of all of these elements, as recognized and recited by the Family Court Judge below.

It naturally follows then, as a matter of law, that neither the mere “desires” of the subject child and the Appellant for “equal time “, nor the recommendation of the Guardian *ad Litem* in this or any case, should be a substitute for proper pleadings and relief from the burden of proof in an action seeking modification of parenting time.

Moreover, “equalization of parenting time”, or really fairness between parents has been statutorily relegated to a “secondary” concern after the more weighty objectives of “best interests”, and the nearly equivalent “stability” of the affected child. West Virginia Code §48-9-102(a) and (a)(1). Succinctly stated, what a parent or even an interested child may want, must be subservient to and may differ from, what will promote the best interests and general welfare of the child in question. *Cloud* and *Alireza, supra*.

As something of an after thought, a Guardian *ad Litem*, who is charged with championing the best interests of his ward, can file appeals from the decisions of the family and circuit courts. West Virginia Code §48-5-107(f) and §48-9-302(a). In the case under scrutiny, the Guardian *ad Litem* filed no appeals from either the February 6, 2009 Final Order on Modification issued by Family Court Judge Sowa, or from the July 6, 2009 Order Refusing Appeal entered by

Judge Alsop; therefore, the Guardian *ad Litem*, from his choice not to seek any appellate review, must have believed that the decisions of the foregoing two jurists was in the best interests of the Parties' child.

III. The Health Insurance Coverage Issue

A child should be provided the better of the two health insurance coverages available through each of his parents without regard to the financial impact upon the child support obligation.

The Appellee stood alone. She had chosen, out of economic concerns, to represent herself in her January 16, 2009 Petition for Expedited Modification of Child Support. The hearing on her Petition, where the Appellant was represented by his current counsel, was held on March 18, 2009.

The Appellee, who is a correctional officer at the Federal Correction Center, in Glenville, West Virginia, enjoys federal health care and dental benefits through her employment. Appellee has no co-pay with her family plan. See Exhibits "A" and "B" attached hereto. Since the February 26, 2002 entry of the Final Parenting Order, the Appellee, with the long term approval, consent and agreement of the Appellant, has had the primary responsibility for the coverage of the affected child herein¹⁴. On the other hand, the Appellant, a West Virginia State

¹⁴Page 6, Paragraph H., of the February 26, 2002 Final Parenting Order reads as follows:

"H. That the Respondent Mother shall be solely responsible for maintaining health insurance coverage, as available through her place of employment, for the benefit of the infant born of the marriage of the Parties hereto, to the exclusion of the Petitioner Father; i.e., the Petitioner Father shall not carry the subject child on his health insurance policy; and,

Policeman, was covered by a health plan only through PEIA, and Appellant thus maintained the secondary coverage for the Parties' son.

Without any commensurate request in his February 6, 2009 Response to the Appellee's January 16, 2009 Petition for Expedited Modification of Child Support, which would serve as notice to the Appellee, and in obvious advancement of his continual quest to lower his child support obligation, the Appellant *orally* moved to modify the February 26, 2002 Final Parenting Order and allow him to become his son's primary health care provider. Of course, the Appellant wanted this alteration of coverage to be reflected in his child support calculation. The Family Court Judge declined to do so.

Contrary to the assertions of the Appellant, a review of the March 18, 2009 electronic (DVD) record before the Family Court Judge confirms that the Appellant submitted no hard data comparing premium costs, co-pays, deductibles or quality of coverage; and he, as opposed to the Appellee, had no dental coverage in place at that time.

All figures, cost quotations and comparative cost analysis were presented by the Appellant *for the first time* in his unsuccessful April 20, 2009 Petition for Appeal to the Circuit Court of Braxton County. Briefly stated, Appellant made no pleadings and presented no numbers, no figures, no

(Emphasis supplied).

documentation and thus no evidence to the Family Court Judge as a basis for any findings of fact on the insurance issue at the March 18, 2009 hearing. The Appellant should then be estopped from arguing the question of primary insurance coverage for the child on an appeal when the issue was not properly raised and passed upon in the trial (family) court. *Lin v. Lin*, __ W.Va. __, __ S.E.2d __, (Cert No. 34596) (2009).

Should this Court allow the Appellant to address the issue of who, as between the Appellant Father and the Appellee Mother, should be permitted to be the primary insurance provider for the Parties' son, the best interests of the child should control. Distilled to its crystalline essence, the best interests of the child principle suggests, nay, demands that the quality of health and dental insurance for such child should never be determined by *how much less child support* the Appellant would have to pay, as his argument seems to suggest.

Although cited by the Appellant in another context, "the primary goal... in all family matters ... must be the *health* and welfare of the child*." *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996). (Emphasis added).

The judicial collective would do well to note and to recognize that the Appellant's efforts on this health insurance issue is really an attempt to *modify* the 2002 Final Parenting Order without any affirmative pleading seeking such relief, and certainly without the offering of any proof in support of such pleadings, had

he made a proper averment. At the risk of being repetitive, the Appellant must allege and prove his case by the appropriate standard. *Misty D.G., supra.*

Another point that begs to be made is that child insurance coverage or child medical needs are functions or derivatives of child support. See West Virginia Code §48-5-603(c) and §48-12-101 *et seq.* Chapter 48, Article 12, Section 102, sub-section (1) does indeed make reference to the “appropriate parent”, as mentioned by the Appellant, which implies the residential or custodial parent should have the first responsibility at compliance. However, the same sub-section says *twice* that the family court shall determine and order the child to be enrolled in “appropriate medical insurance coverage”. *Id.* Unlike “appropriate parent”, the phrase “appropriate medical insurance coverage” *is* defined by reference in Section 102(1) to Section 101.

West Virginia Code §48-12-101(1) provides that “ ‘[a]ppropriate health insurance coverage’ means insurance coverage that is reasonable in cost, *comprehensive* in nature and reasonably accessible to the child to be covered.” (Emphasis supplied). Not to be overlooked is West Virginia Code §48-12-101(5), which expands the instant definition:

“ ‘Insurance coverage’ means coverage for medical, *dental*, including orthodontic, optical, prescription pharmaceuticals, psychological, psychiatric or other health care services.”
(Again, emphasis added.)

On March 18, 2009, the Appellee had *medical and dental* health care coverage through her Federal employment, *and* she had a no co-pay policy. See Exhibit “B” attached. The Appellant had neither. The Appellee voiced no objection to having to pay a higher premium¹⁵ for her child’s comprehensive health and dental care. The Appellant voices only a desire to decrease his child support obligation through the artifice of “saving [the Appellee] money”.

The Legislative history of West Virginia Code §48-12-102(1) strongly supports the Appellee’s argument that the decision of the Family Court Judge and the affirming Circuit Court Judge below were proper exercises of judicial and legislative authority. Prior to its 2007 amendment from the original 2001 promulgation, West Virginia Code §48-12-102(1) was quite specific in its directives; to-wit:

*(1) The court shall order either parent or both parents to provide insurance coverage for a child, if such insurance coverage is available to that parent on a group basis through an employer, multiemployer trust or through an employee's union. If similar insurance coverage is available to both parents, the court shall order the child to be insured under the insurance coverage which provides more comprehensive benefits. (Emphasis added once more). Quoted for other reference grounds in Footnote No. 3 of *West Virginia Dept. of Health and Human Resources Bureau of Child Support v. Carpenter*, 211 W.Va. 176, 564 S.E.2d 173 (2002).*

¹⁵Even if she were not including her son in the plan, the Appellee, who has remarried, would continue her family coverage and thus she would have had to pay a higher premium for family coverage in any event.

The 2007 Legislative session rewrote present Section 102(1), alluded to above, in its current form to apparently anticipate the many qualifications, exclusions and contingencies that may appear in various employment related health care plans. Succinctly and simply put, the Legislature merely entrusted the issue of the better health care coverage for a child, with general guidance (*e.g.*, ‘appropriate parent’, ‘appropriate . . . coverage’, etc.), to the sound, seasoned and good discretion of the family court judge.

The upshot of this admittedly extended discourse is that the Family Court Judge below, for good reasons, exercised his discretion in declining to alter the current health care responsibilities for the Parties’ son; and the same should not be reversed on appeal, in the absence of a clear showing of an abuse of that discretion. *Jordache Enterprises Inc. v. National Union Fire Ins. Co.*, 204 W.Va. 465, 513 S.E.2d 692 (1998).

APPELLEE’S CROSS ASSIGNMENT OF ERROR

Appellee contends that the Family Court Judge committed error at the January 15, 2009 pronouncement of his ruling on the Modification issue, by failing and refusing to award the Appellee Mother the increase of child support sought in her responsive pleading, which she ultimately received by a sequential January 16, 2009 Petition for Expedited Modification of Child Support, when the Court considers the following:

1. That the Prayer in the Appellee's March 31, 2008 Reply to the Appellant's March 7, 2008 Petition to Modify contained a request that the child support be re-calculated;

2. That West Virginia Code §48-5-603(b) directs that at any time child related issues are before the court, child support shall be reviewed, considered or ordered, regardless of the state of the pleadings;

3. That in an obvious effort to avoid the retroactive (to March 7, 2008) application¹⁶ of an assured increase in child support from a recalculation of the obligation in effect at the January 15, 2009 pronouncement of his decision on Modification, the Family Court Judge improperly allowed considerations of "savings" to the Appellant to enter his decision. Succinctly, *three times* on the March 18, 2009 record, in open Court, Family Court Judge Sowa mentioned or stated to Appellant's counsel that he (the Family Court Judge) had saved the Appellant "three grand [at the January 15, 2009 announcement of his decision on modification]". See the following tracts of the March 18, 2009 Family Court DVD record heretofore designated by the Appellee:

11:21:06 - FCJ Sowa: "*Does your client realize that I saved him like three grand when I ruled against the Mother....*";

11:21:40 - FCJ Sowa: "*I saved him three grand...*"; and,

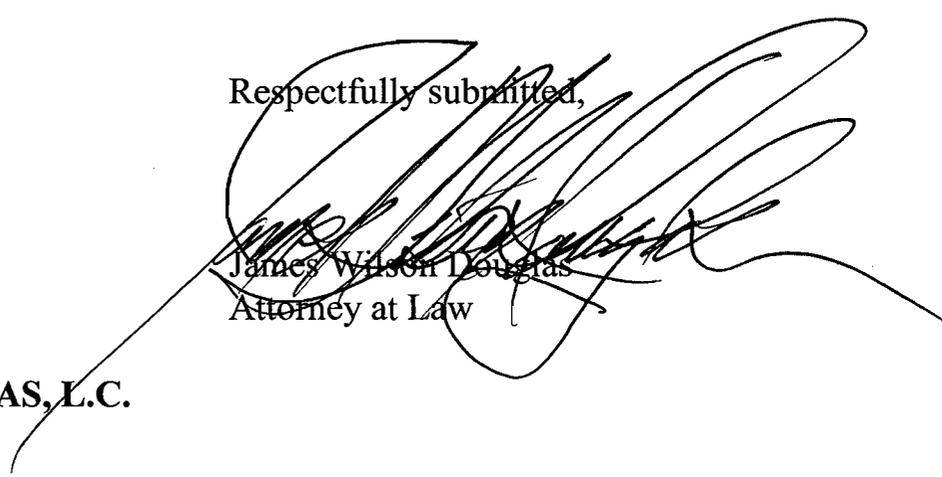
¹⁶Rule 23, WVRPPFC.

11:22:40 - FCJ Sowa: "...except your client, because all of a sudden he is out three grand [Appellant's counsel was arguing that no one would be injured by a delay in the March 18, 2009 proceedings on the child support modification issue]".

CONCLUSION

WHEREFORE, upon the authority cited and for the reasons given, Appellee prays that this Honorable Court enter an Order, after oral argument hereby requested, **AFFIRMING** the June 23, 2009 and July 6, 2009 Orders of the Circuit Court of Braxton County entered hereinbelow; **or in the Alternative**, and consistent with Appellee's Cross-Assignment of Error herein, **REVERSING** only the effective date of the Appellee's increase in receipt of child support; and that she be awarded her attorney fees in this behalf expended, she will ever pray, etc.

Respectfully submitted,



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Counsel for Appellee

VERIFICATION

STATE OF WEST VIRGINIA,

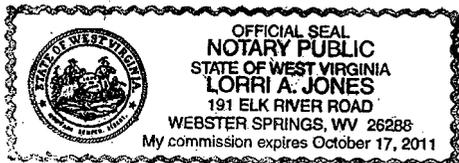
COUNTY OF BRAXTON; TO-WIT:

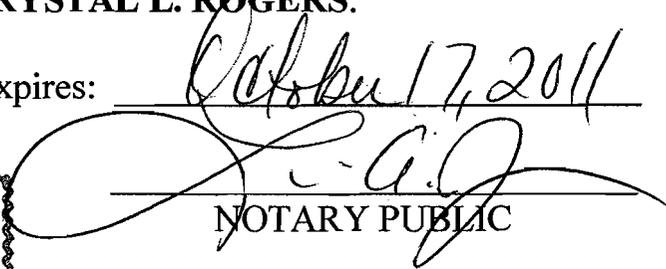
CRYSTAL L. ROGERS, the Respondent named in the foregoing **Attached Pleading**, after being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information and belief, and that so far as they are therein stated to be on information and belief, she believes them to be true.


CRYSTAL L. ROGERS

Taken, sworn to and subscribed before me this the 31st day of December, 2009, by **CRYSTAL L. ROGERS**.

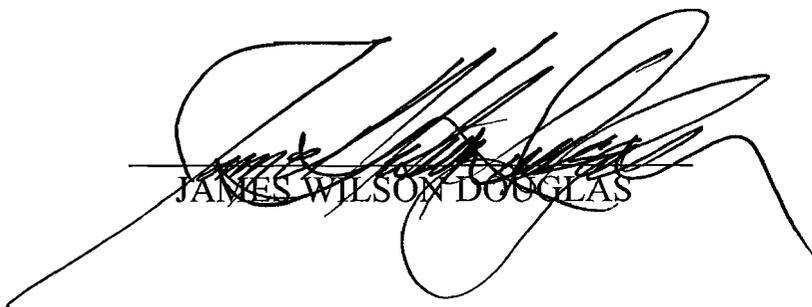
My Commission Expires: October 17, 2011




NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that a true copy of the foregoing Brief of the Appellee was deposited in the regular United States mail in an envelope properly stamped and addressed to Daniel R. Grindo, Attorney at Law and Counsel for the Appellant, 622 Elk Street, Gassaway, West Virginia 26624, on this 31st day of December, 2009.


JAMES WILSON DOUGLAS

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE